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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

THE UNIVERSITY OF TEXAS, ET AL.
Petitioners

V.

WALTER CAMENISCH
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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Petitioners, University of Texas, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 28, 1980, with Petitioners' timely Motion for Rehearing being denied on May 29, 1980.

QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the Court of Appeals misconstrued this Court's decision in *Southeastern Community College v. Davis*, _____ U.S. _____, 99 S.C. 2361 (1979) so as to require that the University of Texas provide auxiliary services and affirmative action under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and assume the financial and administrative burdens of furnishing an interpreter for a deaf graduate student to assist him in his classroom work.

2. Whether the Court of Appeals correctly held that Section 504 of the Rehabilitation Act of 1973 confers a private cause of action in favor of handicapped persons.

3. Whether, assuming arguendo that Section 504 requires auxiliary services and affirmative action which impose a financial burden on a defendant institution and further that Section 504 confers a private cause of action in favor of the handicapped, the handicapped plaintiff must show that the financial assistance received by the institution was intended to support the particular "program" in which the handicapped plaintiff is enrolled or engaged.

PARTIES TO THE PROCEEDING

In the District Court below, Walter Camenisch, as Plaintiff, brought suit against:

The University of Texas;

Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas;

Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas;

Lorene Rogers, individually and in her official capacity as President of the University of Texas, at Austin; and

Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas, at Austin.

All of the individuals no longer serve in the capacities described. However, the University of Texas is the real party in interest and no defect as to parties is alleged by Petitioners.

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OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 616 F.2d 127. A copy of the opinion is also included in the Appendix to this Petition. The District Court opinion is not reported but is included in the Appendix together with the District Court's judgment. The judgment of the Fifth Circuit and its order denying rehearing is also set out in the Appendix (the denial of rehearing is reported at 618 F.2d 1389).

JURISDICTION

The opinion of the Court of Appeals was entered on April 28, 1980. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on May 29, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1234(1).

STATUTE INVOLVED

The statute in question in this case is Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; the statute originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6)(29 U.S.C. §706[6]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for non-discrimination by federal agencies and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7)(29 U.S.C. §706[7]), shall solely by

reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

STATEMENT OF THE CASE

Walter Camenisch, a deaf graduate student at the University of Texas at Austin, sued to require the University to provide him with an interpreter to assist him in his classroom work. The District Court found that Section 504 was applicable to Camenish's claim and directed the University to provide this service and the University appealed. The Court of Appeals affirmed the District Court, under the authority of Section 504, and denied Appellants' Motion for Rehearing En Banc.

At the hearing in the District Court, Walter Camenisch testified that the University, during his studies at the institution, accomodated his handicap at all times by allowing the presence of an interpreter in the classroom.

It was stipulated at the trial that the University of Texas was the recipient of federal funds but no showing was made that any of the programs or activities in which Camenisch took part received federal financial

assistance.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erroneously interpreted this Court's decision in *Southeastern Community College v. Davis.*

The Court of Appeals held in its panel decision that Southeastern Community College v. Davis, ____ U.S. ____ , 99 S.Ct. 2361 (1979), did not prohibit the imposition on the University of Texas at Austin of the financial and administrative burdens of furnishing an interpreter for a deaf graduate student to assist him in his classroom work. The Court in construing *Davis* held:

> "The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d 132.

The Court further stated that:

> "In this case, HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters." 616 F.2d 133.

The Court finally held that:

> ". . .the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification[1], it is

[1]This Court of Appeals' acknowledgment suggests that the certiorari be granted.

> clear that in this case Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession." 616 F.2d 133.

These judicial pronouncements are wrong.

While under *Davis* a University might be required to permit a blind student to tape record lectures where the practice is otherwise forbidden or to permit a deaf student to use an interpreter in the classroom (at the student's expense and which was allowed by the University in this case), no *financial* obligation can be imposed on the University by virtue of Section 504 of the Rehabilitation Act of 1973.

This Court in *Davis* held:

> "Here neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." 99 S.Ct. 2369-70.

The University agrees that it must accommodate, in some cases, handicapped students where no financial outlay is required. However, a reading of the entire Rehabilitation Act of 1973 reveals that Section 504 of the Act was not, and is not intended to create financial obligations on the states and state instutitions.

The Act establishes the Federal Rehabilitation Service Administration and provides for a number of programs to assist the handicapped. Among the services offered are evaluation, counseling, training, restoration, placement and maintenance of the handicapped, and architectural and transportation barriers are also addressed. Federal monies are appropriated to carry out these services.

As the final provision of the Act, Congress added Section 504 (29 U.S.C. §794), which provided:

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

This is all Congress said on the subject of programs receiving federal financial assistance and the participation of handicapped persons in these programs. Nothing was said concerning the enforcement responsibilities of this legislation or the consequences of any violation of the statute. No monies were appropriated by Congress to fund any affirmative action or reasonable accommodation steps or processes which may be required to permit the handicapped to engage in federally assisted programs which may be inaccessible or unavailable unless some accommodation is made in favor of the handicapped.

On April 28, 1976, Executive Order No. 11914 was issued which dealt with non-discrimination in federally assisted programs. Therein, the President conferred on the Department of Health, Education and Welfare (an action questioned by the University), the power to interpret, administer and enforce the provisions of Section 504. However, the Order did not direct HEW to construct an affirmative action program under the aegis of Section 504.

In late 1978, Section 504 was amended to provide for non-discrimination by federal agencies with the requirement that such agencies indicate compliance by the establishment of regulations to implement the non-discrimination mandate. *No such requirement was imposed by Congress on recipient agencies, other than*

federal, to take any affirmative compliance steps.

At the same time that Section 504 was amended to include federal agencies, new handicapped programs were enacted to remove architectural and transportation barriers, to provide employment opportunities for the handicapped, and to provide for "independent living" by handicapped persons, (Pub L. 95-692, codified as 29 U.S.C. §§794(b), 795 and 796). While federal monies were provided for the new programs, Congress again failed to make federal appropriations to provide for accommodation of the handicapped in federally assisted programs covered by Section 504.

It is patently evident that Section 504 imposes no financial liability upon those covered by the Act, and the Court of Appeals' decision in this case is erroneous.

At the very least, this Court should grant a Writ of Certiorari to provide "clarification" of the *Davis* decision for the benefit of the federal courts.

2. The Court of Appeals held that Section 504 provides a private cause of action to handicapped persons, a question expressly left unresolved by this Court in *Southeastern Community College v. Davis.* A Writ of Certiorari should be granted to decide this important and recurring question for the guidance of the Federal Courts.

The Court of Appeals found that Section 504 creates a private cause of action on the part of handicapped persons. This determination is questionable in view of that Court's recent decisions in *Rogers v. Frito-Lay, Inc. and Moon v. Roadway Express, Inc.*, 611 F.2d 1074 (5th Cir. 1980), construing Section 503 of the Rehabilitation Act of 1973.

In *Rogers*, the Court of Appeals declined to find a

private cause of action pursuant to Section 503, stating that:

> "Federal Courts are not common law courts of general jurisdiction. Limited by the express language of the Constitution, and the functional role it allots to the judiciary, we can recognize the cause of action only if it has been created by statute . . . Therefore, our answer to the question in this case depends, the authorities and the parties all agree, on whether Congress intended, when this statute was enacted, to create such a method of enforcing the statutory policy. Because Congress did not speak to us unequivocally, either in the statute or in some other authoritative fashion, we must seek an answer in the history of enactment of the statute and in analogies to what the courts have derived from other statutes."
>
> "Having done so, in a manner we describe below, we have concluded that Congress has not authorized a private cause of action." 511 F.2d 1078.

See also *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 Fed. 87 (4th Cir. 1978), cert. denied 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 471 F.Supp. 119 (D.C. Mo. 1974), affirmed ____ F.2d ____ (8th Cir., May 6, 1980).

The foregoing decisions illustrate the difficulties experienced by the Federal Courts in determining whether a private cause of action exists in remedial, anti-discrimination congressional enactments.

This Court in *Davis* reserved the question of whether or not Section 504 provides a private cause of action, noting:

> "5. In addition to challenging the construction of §504 by the Court of Appeals, *Southeastern*

> also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not §504 provides a private action, she may maintain her suit under 42 U.S.C. §1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them." 99 S.Ct. 2361, 2366 (footnote 5).

Certiorari should be granted to decide the private action question.

Petitioners would argue that no private right of action was created by Section 504. If Congress had intended to grant individuals a private cause of action pursuant to Section 504, it would have done so in clear and unequivocal language. Compare Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq., providing that an aggrieved individual can bring an action in the state or federal courts only after the termination of administrative procedures; and compare the Age Discrimination Act of 1975, 42 U.S.C. §6101 et seq. where Congress specifically amended Section 6104 of the Act (Pub. L. 95-478) in October, 1978, to provide for a private cause of action following the exhaustion of administrative remedies. HEW then issued its proposed Regulations on December 1, 1978, to establish a procedure for the new private cause of action created by Congress under the Age Discrimination Act. 45 CFR Part 90, Section 90.50(a)-(c). However, despite the November, 1978 amendments to the Rehabilitation Act of 1973, HEW has expressly declined to establish a similar procedure for a private cause of action pursuant to Section 504 of the Rehabilitation Act of 1973, noting that it did not have the power to create a private cause of action without statutory authority. See Appendix A, page 378, Title 45, CFR, Part 84.

The question of whether or not Section 504 provides a private cause of action, as held by the Court of Appeals, is of sufficient importance to merit resolution by this Court.

3. This Court should resolve the extent of coverage of Section 504 -- whether 504 applies only to specific programs or activities which receive federal financial assistance or whether Section 504 applies in toto to an institution which receives any federal financial aid;

   There is a conflict in the Circuits on this question and the conflict should be resolved.

In this case, the University received federal financial assistance. The type of aid and for what purpose was not disclosed. Certainly, there was no showing of proof that any of the programs or activities engaged in by Camenisch received financial aid from the federal government.

The Court of Appeals for the Fourth Circuit has seemingly held that there is no 504 coverage unless the program in which discrimination is asserted has received federal financial assistance. *Trageser v. Libbie Rehabilitation Center*, supra. And the Court of Appeals for the Fifth Circuit has required a showing of federal aid to a specific program, a showing of discrimination within a particular program which received federal monies in order to trigger coverage under Title VI §601 (42 U.S.C. §2000d). *Board of Public Institutions of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969). To this same philosophical effect, in determining coverage under Title IX, are the decisions in *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), cert. denied, 100 S.Ct. 467; *Isleboro School Community v. Califano*, 593 F.2d 424 (1st Cir. 1979) cert. denied, 100 S.Ct. 467 and *Junior College District of St. Louis v. Califano*, 593 F.2d 114 (8th Cir. 1979), cert. denied, 100 S.Ct. 467.

Another circuit had reached an opposite conclusion and determined that coverage under a federal act is generated by any federal financial assistance to an institution without regard to whether a particular program or activity that forms the genesis of a law suit has received federal monetary aid. *Bob Jones University v. Johnson*, 396 F.Supp. 597 (D.C.S.C. 1974), aff'd 529 F.2d 514 (4th Cir. 1975). But see *Trageser v. Libbie Rehabilitation Center*, supra.

In the case now before the Court, Petitioners would argue that there has been an insufficient showing that the programs and activities in which Camenish took part received federal financial assistance and that, accordingly, there was no jurisdiction to decide this case under Section 504.

This critical question of the requisite specificity of federal financial assistance should be decided by this Court to resolve the present conflict in the Circuits and provide guidance to all Federal Courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorneys of record for Appellee: Marc P. Charmats, National Association of the Deaf Legal Defense Fund, P.O. Box 1793, Seventh Street and Florida Avenue, N.E., Washington, D.C. 20002; Charles Smith, 812 San Antonio, Suite G-11, Austin, Texas 78100, on this the _____ day of August, 1980.

_____

LONNY F. ZWIENER

APPENDIX

1. Opinion of the Court of Appeals
2. District Court Order
3. District Court Judgment
4. Fifth Circuit Judgment
5. Fifth Circuit Order Overruling Petition for Rehearing

Walter CAMENISCH,
Plaintiff-Appellee,

v.

THE UNIVERSITY OF TEXAS et al.,
Defendants-Appellants.

No. 78-2191.

United States Court of Appeals,
Fifth Circuit.

April 28, 1980.

State of Texas appealed from an order of the United States District Court for the Western District of Texas, at Austin, Jack Roberts, J., directing the University of Texas, under the Rehabilitation Act, to procure and compensate a qualified interpreter to assist plaintiff, a deaf graduate student, in his classes during the 1978 school term. The Court of Appeals, Tuttle, Circuit Judge, held that the district court properly granted preliminary injunctive relief to plaintiff, but the court erred in conditioning the grant of relief on plaintiff's filing of an administrative complaint with the Department of Health, Education and Welfare.

Affirmed in part; vacated in part.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal by the state of Texas from a district court order granting the plaintiff's motion for relief under the Rehabilitation Act of 1973, 29 U.S.C. § 794. The court ordered the University of Texas to procure and compensate a qualified interpreter to assist the

plaintiff in his classes during the 1978 term. As part of that order, the court conditioned its grant of preliminary relief on the plaintiff's filing an administrative complaint with the Department of Health, Education and Welfare (HEW). The court also stayed the action, pending an HEW administrative determination on the merits. We uphold the district court's order granting injunctive relief, but vacate that part of the order conditioning the grant on the filing of an administrative complaint with HEW. We also dissolve the stay of the action.

Walter Camenisch, a deaf graduate student at the University of Texas, filed a complaint and motion for a preliminary injunction on March 1, 1978. In that complaint, he alleged that the University had failed to provide him with sign language interpreter services in violation of Section 504 of the Rehabilitation Act of 1973, and that as a result, he would be unable to complete a master's degree by the end of the 1978 summer term. The plaintiff's completion of a master's degree that summer was a pre-requisite to his maintaining employment as acting dean of students of the East Campus of The Texas School for the Deaf.

Section 504 of the Rehabilitation Act, as written then said:[1]

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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[1]The Act was amended slightly in November 1978.

The University of Texas is a recipient of over $31,400,000 in federal assistance and has agreed to comply with Section 504 as a condition to continued receipt of federal funds. The HEW regulations require colleges to provide auxiliary aids, such as interpreters, for deaf students who cannot otherwise participate in college programs.[2] However, the University denied Camenisch his request for sign language interpreter services on the grounds that he did not meet the University's established criteria for financial assistance to graduate students. The University said he should therefore pay for his own interpreter.

In May 1978, the district court granted the plaintiff's motion for preliminary relief. While not reaching the merits of the claim, the court noted that every court of appeals which had considered the issue had found a private right of action under Section 504. The court further concluded that requiring the plaintiff to exhaust HEW administrative remedies before seeking relief would result in irreparable injury to him, and would defeat his rights under Section 504. The court therefore issued a preliminary injunction relying on this Court's standard for temporary relief, which is substantial likelihood that the plaintiff will prevail on the merits, as set out in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). As stated previously the court also, however, required the plaintiff to post a $3,000 security bond pending the outcome of the litigation pursuant to Rule 65(c) F.R.C.P.; conditioned its grant of relief on the plaintiff's filing an administrative complaint with HEW and stayed the action pending an HEW administrative determination on the merits.[3]

---

[2]See 45 C.F.R. 84.44(d)(1979).

[3]Shortly before this case was argued here, the Department of Health, Education and Welfare issued a letter of findings dated January 24, 1980. In that letter, which was a response to the

We first must determine the proper standard to be used in reviewing the district court's preliminary injunction order. Appellate review of such orders is limited to an examination of whether the district court abused its discretion. *Blackshear Residents Organization v. Romney*, 472 F.2d 1197, 1198 (5th Cir. 1973).

The court below applied this Court's standards for the granting of preliminary relief as set out in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). In *Canal Authority*, this Court delineated four factors that had to be met before a court could grant preliminary relief. Those factors are:

1. Irreparable harm to the plaintiff from failure to issue the injunction.

2. The relative lack of harm to the defendant from issuance of the injunction.

3. The public interest.

4. Probability that the plaintiff will ultimately succeed on the merits.

In this case, it is clear that Camenisch would have suffered irreparable harm from a failure to issue the injunction. Without an interpreter, he would have been unable to complete the academic program in which he was enrolled, would not have been able to earn his degree, and thus might have lost his position as Acting Dean of Students. The harm to the defendant of granting the injunction was not great either. This question of the balance of hardship—how the plaintiff's harm compares to the harm to the defendant if the preliminary injunction is granted—must be considered

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administrative complaint filed in May 1978, HEW found that the University was in violation of Section 504 by failing to provide educational auxiliary aids to students with impaired sensory skills.

in the context of the requirement of posting a bond. *See Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 674, 88 L.Ed. 834 (1944); *Note, Interlocutory Injunctions and the Injunction Bond*, 73 Harv.L.Rev. 333 (1959). In this case, the posting of the $3,000 bond by the plaintiff clearly protected the defendant from any permanent harm.

The final two considerations—the pubic interest and the probability that the plaintiff will ultimately succeed on the merits, can only be considered by an examination of the merits of Camenisch's claim. We therefore turn to an examination of that claim.

I

The district court found that every United States Court of Appeals which had attempted to determine whether the Rehabilitation Act conferred a private individual right of action under Section 504 to enforce the Act through injunctive relief had found that it did. The University argues here, again, that there is no private right of action under Section 504, even in suits for injunctive relief.

As an initial point, it has been suggested to this Court that this issue is now moot, because Camenisch has received the relief he sought. Such an argument shows a basic lack of understanding of what is at stake in this dispute. The University provided Camenisch with an interpreter *at its own expense* under order of the district court. The University argues, in effect, that Camenisch should have had to pay for that interpreter, since they were under no obligation to provide one. Camenisch has posted a bond that can be used to repay the appellants, if he loses this appeal. Therefore, despite the fact that Camenisch has graduated, a justiciable issue remains: whose responsibility is it to pay for this interpreter?[4]

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[4]Because the issue is stated in this manner does not mean that this is a suit for damages. Camenisch filed a claim for injunctive relief

This is simply another way of stating the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond. *Liner v. Jafco, Inc.*, 375 U.S. 301, 305, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978).[5]

Turning to the merits, we find ourselves in complete agreement with the other Courts of Appeal that have decided this issue and found such a right of action, applying the test of *Cort v. Ash*, 442 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *See Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *National Association for the Advancement of Colored People v. The Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979). We agree with the *Cort analysis* of Section 504 undertaken in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-86 (7th Cir. 1977) in which that Court found an explicit congressional intent to create such a private right of action and found that such a right was consistent with the purposes of the legislation.[6]

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and the appeal is from an injunction. Therefore, this case concerns only a right of action for injunctive relief.

[5]The fact that HEW, in response to Camenisch's administrative complaint, had issued a letter of findings that the University was in violation of Section 504 by failing to provide interpreters to assist students like Camenisch, does not render this case moot either. We hold in Part II of this opinion that the administrative procedures under the Rehabilitation Act are not appropriate to private individual suits to enforce Section 504 in the courts. Therefore, Camenisch's court claim stands by itself.

[6]*See e.g.*, The Committee Report to the Senate, which stated:

We also take note, of the Supreme Court's decision in *Campbell v. Kruse*, 434 U.S. 808, 98 S.Ct. 38, 54 L.Ed.2d 65 (1977) in which the Supreme Court vacated the judgment of a three-judge district court, which held that a Virginia statute, providing partial tuition grants to handicapped children who were not affluent enough to take advantage of these partial grants. The Supreme Court directed the district court to decide the plaintiffs' claim "based on the federal statute, Sec. 504 of the Federal Rehabilitation Act of 1973." 434 U.S. at 808, 98 S.Ct. at 38. With this ruling the Supreme Court seemingly acknowledged the judicial authority to entertain private suits for injunctive relief under Section 504.[7]

The appellants agrue here that *Lloyd* and other cases were decided before HEW promulgated regulations designed to implement Section 504. Their position apparently is that the legislative history of the Act shows a Congressional intent that any judicial action under the Act be limited to a post-administrative remedy judicial review. In *Lloyd*, the Seventh Circuit said:

> We expressly leave open as premature the question whether, after consolidated

---

> This approach to implementation of Section 504, which closely follows [Title VI], ... would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.* (Emphasis and words in brackets added.) S.Rep. No. 93-1297, 93 Cong. 2d Sess. 39-40, *reprinted in* 4 U.S. Code Cong. & Admin. News, pp. 6373, 6391 (1974).

[7]*See* also the opinion of Justice Stevens in *Regents of University of California v. Bakke*, 438 U.S. 265, 420 n. 27, 98 S.Ct. 2733, 2748 n. 27, 57 L.Ed.2d 750 (1978) which seems to recognize that Section 504 of the Rehabilitation Act can be enforced by private actions in the courts.

> procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a *posterior* judicial review. (Citations omitted.)

548 F.2d at 1286 n. 29.

We reject this argument. First, issuance of these regulations preceded the Supreme Court's decision in *Campbell v. Kruse*. Second, the administrative procedures adopted for enforcement of Section 504 do not constitute the "consolidated procedural enforcement regulations" contemplated in *Lloyd, supra*, 548 F.2d at 1286 n. 29. As HEW has itself explained, these procedures are only intended to be in effect until "such time as they are superseded by . . . a consolidated procedural regulation applicable to all . . . civil rights statutes and executive orders administered by the Department." 45 C.F.R. Part 84, App. A, p. 394 (1979).[8] Third, in the recent case of *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court found a private right of action under Title IX. The administrative procedures applicable to that right of action are identical to the

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[8]This is not to say that once such consolidated procedural regulations are in effect, we will adopt the appellant's view. We specifically reserve judgment on that question.

procedures applied to complaints under Section 504. The regulations implementing Section 504 adopt the Title VI enforcement procedures, 45 C.F.R. §84.-61 (1979), the same administrative mechanisms used to enforce Title IX, 45 C.F.R. §86.71 (1979). When the Supreme Court found a private right of action under Title IX despite these regulations, it implicitly rejected the argument that these same procedures militated against the finding of a private right of action under Section 504.[9] Therefore, we find that Section 504 creates a private individual right of action for equitable relief.[10]

In a letter to this Court, the appellant has made the additional argument that the Supreme Court's recent decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct.2361, 60 L.Ed.2d 980 (1979) bars relief for this plaintiff. In *Southeastern Community College*, Mrs. Davis, a deaf person, sought admission to Southeastern's Associate Degree Nursing program. Completion of study in that program would qualify her for certification as registered nurse. She was denied admission, solely because of her disability. She brought suit claiming discrimination under Section 504, but the Supreme Court unanimously held there was no illegal discrimination. The Court found that Mrs. Davis was not an "otherwise qualified handicapped individual

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[9]*See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1083 (5th Cir. 1980):

> "Moreover in *Cannon v. University of Chicago*, the Supreme Court found an implied cause of action in Title IX . . ..
>
> The parallel in construction between Title IX and Section 504 is evident."
>
> [Citations omitted.]

[10]We expressly reserve judgment on the question whether Section 504 creates a private right of action in suits for damages. *See Miener v. Missouri*, _____F.Supp._____(E.D.Mo. 1980); *Patton v. Dumpson*, _____F.Supp._____(S.D.N.Y. 1980).

within the meaning of § 504," holding that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* 99 S.Ct. at 2367. The appellant argues that the holding in *Southeastern Community College* is applicable here.

We disagree. The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future. In *Southeastern Community College*, the Supreme Court said:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear .... Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

Id. at 2370.

In this case, HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters.[11] However, the HEW regulations did not require the sort of "individual attention" services that Mrs. Davis required to get through nursing school, an educational program that provided much more than simply academic training, *Southeastern Community College* at 2368-69.

Like the Supreme Court, we also take special note of the analysis of the district court in *Davis v. Southeastern Community College*, 424 F.Supp. 1341 (E.D.N.C., 1976),

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[11]*See* 45 C.F.R. § 84.44(d)(2) (1979).

which found that Mrs. Davis had not been discriminated against. There, the Court said:

> [it] would most probably be impermissible to exclude a blind or deaf person from admission to a law school, if academically qualified. However, reason dictates that it would be entirely permissible to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator. Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in site of the handicap, if proper training and facilities are suitable and available. The major problem with the plaintiff's [Davis's] contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession.

Id. at 1345 [words in brackets added.]

Read in this light, the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification, it is clear that in this case, Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession.[12]

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[12]This is consistent with the analysis of this case, undertaken in the excellent article, Note, Defining the Rights of the Handicapped Under Section 504 of the Rehabilitation Act of 1973; Southeastern Community College v. Davis, 24 St. Louis L.J. 159 (1979).

II

Given our determination that Camenisch's claim succeeds on the merits, and our previous analysis of the first two factors that have to be met before a court can grant preliminary injunctive relief, we now turn to consideration of the administrative exhaustion requirement. The district court found that Camenisch did not need to exhaust HEW administrative remedies before seeking injunctive relief. Resort to such procedures, the court said, would result in "irreparable injury" to him, because the regulations contain no provisions for providing the sort of emergency relief he seeks. However, the district court, as stated earlier, required the plaintiff to file an administrative complaint with HEW; stayed further proceedings pending this final administrative determination and required Camenisch to post a $3,000 security bond. Therefore, the district court must have reasoned that the administrative exhaustion requirement was applicable to private rights of action under Section 504 filed in the courts, when no exceptions to the exhaustion doctrine were present.

It has been suggested here too, that even if Camenisch's claim for relief is not moot, the exhaustion issue is moot because HEW recently has issued a letter finding the University in violation of Section 504 in failing to provide educational auxiliary aids to students with impaired sensory skills. *See* Note 3. We reject this suggestion. We cannot determine adequately both the existence and the scope of a private right of action under Section 504 in the courts without considering the extent to which that right of action is limited by an administrative exhaustion requirement. An inappropriate exhaustion requirement could so limit the existence of the private right of action we find today that it would effectively do away with our holding in Part I, that it was the Congressional intent that plaintiffs have access to the courts to enforce individual

causes of action under Section 504. A decision on the existence of such a cause of action is so inextricably bound up with a decision about exhaustion, that we must also consider the exhaustion issue here. *Cf. Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).[13]

The appellant argues that no exceptions to the exhaustion doctrine were present in this case, and that the district court should have required Camenisch to exhaust his administrative remedies before granting the preliminary injunction. Camensich argues, in opposition, that the district court decided the exhaustion issue correctly. He says that a number of exceptions to the exhaustion requirement are applicable here. First, the HEW administrative procedures contain no administrative enforcement mechanism to provide the emergency relief sought here. 45 C.F.R. § 84.62, 80.8(a) (1979); *see Barnes v. Converse College*, 436 F.Supp. 635 (D.S.C. 1977). It is well-settled that where there is no adequate administrative procedure available, the exhaustion doctrine does not apply. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied* 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). Second, excessive administrative delays render HEW's administrative remedies inadequate to help him and therefore a waiver of the exhaustion requirement is justified. *Walker v. Southern Railway Co.*, 385 U.S. 196, 198, 87 S.Ct. 365, 366, 17 L.Ed.2d 294 (1966); *cf. White v. Mathews*, 559

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[13]*Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) provides an interesting analogy to the case. In *Sibron*, the Supreme Court found the appellant's criminal appeal not moot, even though he had finished serving his criminal sentence, because of the collateral consequences of a criminal conviction. In this case, if this Court were to find the exhaustion issue moot, it would have severe collateral consequences on future plaintiffs who seek to bring actions under Section 504.

F.2d 852 (2nd Cir. 1977), *cert. denied* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Third, there is no need to exhaust an administrative remedy where the administrative agency has waived the exhaustion requirement, which the Office of Civil Rights of HEW has done in these sorts of cases. *Cf. Weinberger v. Salfi*, 442 U.S. 749, 765—767, 95 S.Ct. 2457, 2466—2467, 45 L.Ed.2d 522 (1975).

We find all of these arguments persuasive as to why an appropriate exhaustion requirement would have to be waived in this case. However, we disagree with the district court's apparent assumption that the HEW administrative procedures are relevant to a private individual right of action for injunctive relief under Section 504 pursued in the courts. The HEW administrative procedures do not provide the most appropriate or exclusive remedy to vindicate personal Section 504 rights. Because we find that a plaintiff is under no obligation to pursue administrative remedies in Section 504 actions, we vacate that part of the district court's order conditioning its grant of preliminary relief on the requirement that the plaintiff file an administrative complaint with HEW.[14] Since Camenisch was under no obligation to pursue these administrative procedures, there was obviously nothing he needed to exhaust before the court could grant relief.

In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court found an implied right of action under Title IX. As stated previously, the regulations HEW had adopted to implement Section 504 adopt the Title VI enforcement

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[14]This inquiry goes to the district court's view of the law concerning exhaustion. Since this was not part of the district court's decision as to whether the issuance of an injunction was necessary, it is not examined under the *Blackshear Residents Organization* "abuse of discretion" standard. Instead, it is examined in the way we examine trial court determinations of law.

procedures, 45 C.F.R. § 84.61 (1979), the same administrative procedures used to enforce Title IX, 45 C.F.R. § 86.71 (1979). In *Cannon*, the Supreme Court said that the complaint procedures adopted by HEW did not allow the complainant to participate in the administrative investigation or subsequent enforcement proceedings. If a violation was found, a resulting compliance agreement might not include relief for the complainant. Furthermore, the Court found that the ultimate remedy, a complete cut-off of federal funds to the institution was an inappropriate result for an individual complainant. 99 S.Ct. at 1962-63, n. 41. For all of these reasons and others, the Supreme Court concluded that private suits to enforce individual causes of action are appropriate in Title IX cases, without resort to administrative mechanisms. The same reasoning applied here because the enforcement regulations are the same. *See Upshur v. Love*, 474 F.Supp. 332, 341 n. 23 (N.D. Cal., 1979). "[W]hile the administrative process may effectively provide, by way of the threat of a funding termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker v. Board of Higher Ed. of City of New York*, 461 F.Supp. 99, 108 (E.D.N.Y., 1978).

In *Lloyd*, discussed earlier in Part I, the Seventh Circuit stated that "[t]here being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies." 548 F.2d at 1287 *citing Rosado v. Wyman*, 397 U.S. 397, 405-06, 90 S.Ct. 1207, 1214-15, 25 L.Ed.2d 442 (1970). As we stated earlier, the promulgation of HEW regulations since the *Lloyd* decision has not changed the basis of that decision. The HEW administrative process does not provide the most appropriate remedy to vindicate these private causes of action.

It is clear why the Supreme Court reached the result it

did in *Cannon*. The administrative enforcement process, established by Congress as a part of Title VI, centers entirely on the question of whether, in light of the policies and practices of a recipient of federal assistance, federal funds should continue to flow to that recipient. It is predicated upon the need by the Secretary to monitor and enforce the nondiscrimination provisions of agreements between HEW and the recipients of federal assistance. *See* 45 C.F.R. 80.8-80.9 (1979). The purpose of the administrative framework is to provide a forum in which to initiate fund termination proceedings in the event a grant recipient fails to meet its obligations. It is not intended to provide a forum for program beneficiaries to press claims of discrimination against grant recipients. *See* 45 C.F.R. 80.8(a), 80.10(f) (1979).

The remedy that emerges from such a hearing process is not designed to aid petitioners like Camenisch at all. A decision to terminate funding of a non-complying recipient could work to the disadvantage of a complainant like Camenisch, since such a cut-off could guarantee that no further services accrue to the complaining party. There is no specific vindication of personal rights within the HEW administrative procedure for complaining parties like Camenisch.[15]

Our holding that private individual suits to enforce Section 504 rights can be brought without previous resort to administrative remedies, is entirely consistent with HEW enforcement efforts under the statute. The appellees have filed in this Court the affidavit of

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[15]*See Regents of the University of California v. Bakke*, 438 U.S. 265, 419 n. 26, 98 S.Ct. 2733, 2748 n. 26, 57 L.Ed.2d 750 (1978) (concurring opinion of J. Stevens) for a similar analysis of the distinction between suits to enforce personal rights and administrative proceedings aimed at government fund termination. *See also Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir. 1967), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967).

Michael Middleton, Director of the Division of Policy and Procedure in the Office of Civil Rights (OCR) in HEW, in which he says that it is OCR policy that Section 504 complainants should be allowed to file civil actions in the federal courts, without exhausting either the grievance procedures established by a recipient or HEW's own complaint procedures. We think it makes good sense and was the Congressional intent that Section 504 rights be protected by grant termination through the administrative process or by private suits to eliminate the proscribed discrimination.[16]

AFFIRMED IN PART AND VACATED IN PART.

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[16]*Cf. Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) in which the Supreme Court rejected the arguments of defendants who claimed that a state welfare regulation was not subject to attack in a legal suit by a private plaintiff because HEW had the power to terminate federal funding for non-compliance with federal regulations.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WALTER CAMENISCH,	*	
	*	
Plaintiff	*	
	*	
V.	*	No. A-78-CA-061
	*	
THE UNIVERSITY OF TEXAS, ET AL.,	*	
	*	
	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

Came on on the 11th day of May, 1978, Plaintiff's action for preliminary relief under the Rehabilitation Act of 1973, §504, 29 U.S.C. §794, and under the Fourteenth Amendment to the United States Constitution. Plaintiff is a deaf person attending Graduate courses at Defendant institution as a prerequisite to maintaining his current employment as acting Dean of Students on the East campus of the Texas School for the Deaf. Attached hereto are 18 stipulations of facts and five exhibits which thoroughly set forth the pertinent facts in this matter. Defendants assert that they follow all policies mandated by the Rehabilitation Act in that they treat all handicapped students on the basis of individual need and that Plaintiff can hire his own interpreter. They also urge that no private right of action exists for Plaintiff.

The stipulations entered into make clear that Plaintiff meets the test of being a handicapped person under the Rehabilitation Act. That Act has adopted Title VI interim procedures for its implementation which require filing a complaint with HEW and awaiting investigation by that agency.

It appears that every United States Court of Appeals which has attempted to determine whether the Act confers a private right of action as well as an administrative right has held that, under the test in *Cort v. Ash*, 442 U.S. 66, such a right must be implied from §504 of the Act, 29 U.S.C. §794, as amended. *Davis v. Southeastern Community College*, No. 77-1237 (4th Cir., Mar. 28, 1978); *Lloyd v. Regional Trans.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977). In addition, numerous federal district courts have determined that a private right of action exists under §504. See *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976); *Borden v. Rohr*, No. 750844 (S.D. Ohio, Dec. 31, 1975); *Mattie T. v. Holladay*, C.A. No. D.C. 75-31 (S.D. Miss. July 28, 1977); *Bartels v. Biernat*, 405 F.Supp. 1012 (E.D. Wisc. 1977).

Defendant relies heavily, in arguing against such private right of action, on the case of *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976); however, that Court was contemplating Title IX Educational discrimination remedies, not those promulgated under §504. Furthermore, that same circuit found a private right of action to exist under §504 of the Rehabilitation Act in the *Lloyd* case, *supra*.

Since it is now clear that Legislature has adopted interim Title VI administration procedures, it is necessary to inquire as to whether relief will be meaningful and in accordance with the underlying intent of the Act. Several Courts have held that despite failure to seek any administrative recourse, administrative exhaustion should not be imposed in all instances if there is no realistic possibility of a meaningful remedy. *Alexander v. Yale*, N-77-277 (D. Conn., Dec. 21, 1977); *Grossman v. Texas Tech University*, CA-5-77-23 (N.D. Tex., Nov. 18, 1977), wherein the Court denied Defendant's Motion to dismiss a Title IX private action, stating:

> In the absence of a procedure through which the individuals protected by Section 601's prohibition may assert their rights under it, violations of the law are cognizable by the Courts.

Since Title VI procedures have been specifically adopted for interim enforcement of §504, the Court must consider the time involved for exhaustion of such procedures and the effect on Plaintiff. The applicable HEW regulations contain no provisions for providing emergency relief of the nature requested by Plaintiff. All administrative complaints are treated similarly. Plaintiff submits, in his Memorandum in Opposition to Defendants' Motion to Dismiss, the Office for Civil Rights' Annual Operating Plan for Fiscal Year 1978 reveals that only 26 of 756 handicap complaints filed in 1978 will be investigated. An HEW finding in Plaintiff's favor one or two years from now will give him no effective relief whatsoever, for, as the stipulations show, he may very well have lost his employment by then. If, on the other hand, HEW found for Defendants, it could order Plaintiff to reimburse the cost of interpretive services paid by Defendants. Plaintiff has previously offered such a course of action to Defendants, including his willingness to post an appropriate bond, but Defendants are unwilling.

Defendants argue also that the *Lloyd* holding applies only in the absence of "consolidated procedural enforcement regulations ... to implement §504 . . .", *Lloyd*, at 1286, apparently assuming that the current interim guidelines are such regulations. However, the HEW analysis of the Act states that the Title VI procedures are to be used in implementing §504 "until such time as they are superseded by the issuance of a *consolidated procedural regulation* . . .", 42 Fed. Reg. 86, p. 22865.

Even if the Court finds no private right of action under §504, in light of the fact that exhaustion

procedures are meaningless with respect to this Plaintiff, the Court should apply the Fifth Circuit standard for temporary relief to see if the injunction sought is appropriate. See Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). There is a substantial likelihood that Plaintiff will ultimately prevail on the merits. In balancing this factor with the relative costs to the parties, the public interest, the state requirement that Plaintiff obtain his Master's degree, and the potential irreparable injury resulting from Plaintiff's loss of employment, a preliminary injunction granting Plaintiff the relief sought will issue. Barnes v. Converse College, 436 F.Supp. 632 (D.S.C. 1977); Crawford v. University of North Carolina, 440 F.Supp. 1047 (M.D.N.C. 1977). As the Court in Barnes states, ". . . the refusal to grant Plaintiff the relief at this time would defeat any rights she may have under the statute and regulation, and by failing to give effect to Plaintiff's rights would cause her immediate and irreparable injury . . ." 436 F.Supp. at 638.

Essentially, preliminary relief for Plaintiff equates to full relief, since by the time exhaustion is completed, Plaintiff will probably have both his graduate degree and a permanent job. But since Plaintiff is obviously within the class of persons intended to be protected by the Act, the lack of a course of meaningful administrative relief should not be allowed to stand in Plaintiff's way and cause him irreparable harm. This is particularly true if reimbursement to Defendants is made a condition of the injunction upon a later determination by HEW that is negative to Plaintiff. This follows the concept set out in *Crawford* and several other cases cited by Plaintiff. It is to be noted that, as a condition of preliminary relief, that Court required Plaintiff to file an administrative complaint with HEW. This was filed November 22, 1977, and has yet to be acted upon.

Defendants' 11th Amendment and Sovereign Immunity arguments have already been disposed of by the cases of *Elderman v. Jordan*, 415 U.S. 651 (1974), and *Milliken v. Bradley (Milliken II)*, _____ U.S. _____, 97 S.Ct. 2749 (1977). Plaintiff seeks only non-monetary injunctive relief, not a cash award.

As the Court reaches this decision on statutory grounds, there is no need to reach the constitutional issues raised by parties.

It is, accordingly, ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue as to Defendants, in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff during his completion of his Master's work at Defendant University. As a condition of such relief, Plaintiff shall post a security bond in the amount of *$3000.00* pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P.

It is further ORDERED that this action be stayed, pending a final administrative determination on the merits, and that as a condition of preliminary injunctive relief, Plaintiff be required to initiate a complaint with HEW requesting the relief sought herein. Furthermore, the Court suggests Plaintiff consider seeking *amicus curiae* intervention in this matter by the Secretary of HEW.

ENTERED this *17* day of *May*, 1978, at Austin, Texas.

/s/

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS—AUSTIN DIVISION

CIVIL ACTION FILE NO. A-78-CA-061

WALTER CAMENISCH

vs. JUDGMENT

UNIVERSITY OF TEXAS, Et al

This action came on for ~~trial~~ (hearing) before the Court, Honorable JACK ROBERTS, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that a preliminary injunction issue as to Defts', in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Pltf during his completion of his Master's work at Deft., University. As a condition of such relief, Pltf shall post a security bond in the amt. of $3000.00 pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P. Further ORDERED that this action be STAYED, pending a final administrative determination on the merits, and that as a condition of prel inj relief, Pltf be required to initiate a compl't. with HEW requesting the relief sought herein. Furthermore, the Court suggests Pltf consider seeking *amicus curiae* intervention in this matter by the Sec. of HEW.

Dated at Austin, Texas, this 17th day of May, 1978.

WILLIAM G. PUTNICKI

.....

Clerk of Court

BY /s/

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * *

October Term, 19

* * *

No. 78-2191

* * *

D.C. Docket No. A-78-CA-061

WALTER CAMENISCH,

Plaintiff-Appellee,

versus

THE UNIVERSITY OF TEXAS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part, and vacated in part;

It is further ordered that defendants-appellants pay to the plaintiff-appellee, the costs on appeal, to be taxed by the Clerk of this Court.

April 28, 1980

Issued as Mandated: Jun 6 1980

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 29, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-2191 - Walter Camenisch -vs- The University of Texas, Et Al

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

BY /s/ _____

Ms. Martha H. Allan
Mr. Sheldon E. Steinbach
Mr. Marc P. Charmatz
Mr. Walter W. Barnett